STATE OF MICHIGAN

IN THE SUPREME COURT

BRUCE MILLAR,

Plaintiff/Appellant,

Supreme Court Docket No.: 154437
Court of Appeals Docket No.: 326544
Lower Court Docket No.: 14-047734-CZ

v.

CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,

Defendants/Appellees.

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DEFENDANT/APPELLEE CONSTRUCTION CODE AUTHORITY'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S MAY 19, 2017 ORDER

ORAL ARGUMENT REQUESTED

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BASIS FOR SUPPLEMENTAL BRIEF

On September 16, 2016, Plaintiff/Appellant Bruce Millar filed with this Court an application for leave to appeal ("Application"). The subject of the Application was the Michigan Court of Appeals' decision upholding the Lapeer County Circuit Court's dismissal of Plaintiff's lawsuit in its entirety. The primary basis for the trial court's dismissal of Plaintiff's lawsuit was its determination that Plaintiff's claim asserting a violation of Michigan's Whistleblowers' Protection Act ("WPA") was untimely, as it was not filed in compliance with the WPA's 90-day statutory limitations period.

On May 19, 2017, this Court issued an order directing the parties to submit supplemental briefs regarding whether Plaintiff's claim under the WPA was barred by the 90-day limitation period set forth in MCL 15.363(1). The Court further directed that the parties should not submit mere restatements of their application papers and that the Court would hold oral argument on Plaintiff's Application following submission of the parties' supplemental briefs. This brief is Defendant/Appellee Construction Code Authority's ("CCA") timely supplemental brief submitted pursuant to the Court's May 19, 2017 order. For the reasons set forth below, the CCA respectfully requests that this Court deny Plaintiff's Application, affirm the Court of Appeals' August 4, 2016 order affirming summary disposition in the CCA's favor and grant any other relief the Court deems just and appropriate.

SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

1. **WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO DEFENDANT CCA BECAUSE PLAINTIFF FAILED TO TIMELY FILE A CLAIM ASSERTING A VIOLATION OF MICHIGAN'S WPA WHEN HE FAILED TO FILE HIS LAWSUIT WITHIN 90 DAYS OF THE DATE OF THE ALLEGED ACTION THAT PRECIPITATED HIS CLAIM.**

   The Trial Court Answers: "Yes"

   The Court of Appeals Answers: "Yes"

   Defendant-Appellee Construction Code Authority Answers: "Yes"

   Plaintiff-Appellant Answers: "No"

STATEMENT OF FACTS

The CCA incorporates by reference the Statement of Facts set forth in its Answer in Opposition to Plaintiff's Application.

I. INTRODUCTION

On February 9, 2015, the CCA filed a motion for summary disposition in the trial court pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8) seeking dismissal of Plaintiff's lawsuit. In the motion, the CCA asserted, for purposes of this supplemental brief, that Plaintiff's WPA claim was time barred because he did not file his lawsuit within the WPA's 90-day statutory limitations period and that Plaintiff's Complaint failed to state a claim under the WPA upon which relief could be granted. Therefore, the CCA asserted that it was entitled to summary disposition of this claim pursuant to MCR 2.116(C)(8).

On March 19, 2015, the trial court entered an order granting the CCA's dispositive motion, and those of co-Defendants Imlay City ("City") and Elba Township ("Township"). Plaintiff then appealed the trial court's ruling to the Michigan Court of Appeals asserting that the trial court incorrectly granted summary disposition. On August 4, 2016, the Court of Appeals affirmed the trial court's decision in its entirety. As to Plaintiff's WPA claim, the Court of Appeals determined:

> In essence, plaintiff alleged that CCA, acting in accord with the directives of the City and Township, terminated his employment in retaliation for his reporting various code violations. Plaintiff argues that the 90 day time deadline started on the day that he received the letter – i.e. March 31, 2014. However, a claim accrues at 'the time the wrong upon which the claim is based was *done* regardless of the time when damage results.' *Joliet*, 475 Mich at 36. Here, the alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity – i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so. Instead, plaintiff filed his complaint on June 26, 2014, 107 and 98 days respectively after the allegedly wrongful conduct took place. Moreover, even if we were to assume that CCA's conduct was the allegedly wrongful conduct that commenced the 90 day clock, plaintiff filed his complaint 91 days after CCA's alleged wrongful act –

> i.e. termination of plaintiff's assignments in the City and the Township on March 27, 2014.

Millar v Construction Code Authority, et al, unpublished opinion per curaim of the Michigan Court of Appeals, decided August 4, 2016 (Docket No. 326544). As set forth below, the Court of Appeals correctly upheld the trial court's dismissal of Plaintiff's WPA claim because: (1) this ruling correctly abides by the clear and unambiguous language in the WPA's statutory limitations period, which requires that claims asserting a violation of the WPA be filed within 90 days of the defendant's alleged violation of the WPA; and (2) this ruling is consistent with Michigan's established case law regarding claim accrual. Accordingly, the CCA respectfully requests that this Court deny Plaintiff's Application and uphold the Court of Appeals' dismissal of Plaintiff's WPA claim as untimely.

II. LEGAL STANDARD

This Court reviews de novo rulings on summary disposition motions, viewing the evidence in the light most favorable to the nonmoving party. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). In the absence of disputed facts, whether a cause of action is barred by the applicable statute of limitations is a question of law, which this Court reviews de novo. *Moll v Abbott Labs*, 444 Mich 1, 26; 506 NW2d 816 (1993).

III. ARGUMENT

I. The Trial Court And Court Of Appeals Correctly Determined That Plaintiff Failed To Timely File His Complaint Within the WPA's 90-Day Statutory Limitations Period, As Those Decisions Are Consistent With Established Michigan Law Requiring That Clear And Unambiguous Statutory Language Be Enforced As Written.

A. Relevant Law.

At its core, the issue in the instant matter is one of statutory interpretation. Therefore, the Court must apply its established principles of statutory construction. "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002) (citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996)); *AFSCME v City of Detroit*, 468 Mich 388, 399-400;662 NW2d 695 (2003). To do so, the Court must begin by reviewing the language of the statute at issue. If the statute's language is clear and unambiguous, the Court assumes that the Legislature intended its plain meaning, and the Court must enforce the statute as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155

(1992); *Omelenchuk* at 528 (quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001)). Additionally, courts "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (emphasis added). As this Court stated in *Robertson v DaimlerChrysler Corp*,465 Mich 732, 748; 641 NW2d 567 (2002), "[t]he Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."

This Court has consistently applied these rules of statutory construction to Michigan statutes that parties have attempted to enlarge beyond the actual language contained within the statute, including the WPA, which is at issue here, and the Governmental Tort Liability Act ("GTLA"). Michigan law already provides that the language of the WPA is clear and unambiguous. *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 574-75; 753 NW2d 265 (2008). Further, contrary to Plaintiff's assertion here, Michigan courts must follow the unambiguous language of a statute, "even if doing so would produce an absurd or irrational result." *Id*. (citing *People v McIntire*, 461 Mich 147, 155-158 & n 2; 599 NW2d 102 (1999)).

Applying the rules of statutory construction, in *Wurtz v Beecher Metro Dist*, 495 Mich 242, 244, 848 NW2d 121 (2014), this Court held that the WPA did not apply to decisions regarding contract renewal of employees, such that the WPA provided no protection to a contract employee seeking a new term of employment. The Court based this decision on the actual language of the WPA, which contained a definition of the term "employee." Based on that definition, the Court determined that it was not appropriate to apply the WPA to a prospective

employee, including those seeking contract renewal, where the Legislature did not, pursuant to the language it used in drafting the WPA, intend to cover such individuals.

Similarly, in *Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 216-19; 731 NW2d 41, 53-55 (2007), this Court held that the GTLA, MCL 691.1404, is straightforward, clear, unambiguous, and not constitutionally suspect and that, accordingly, it must be enforced as written. The Court based its decision on its prior decision in *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000), in which the Court held that any statutory reliance analysis has to be considered in light of the plain language of the statute. The Court stated:

> Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . ., that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.

Rowland, *supra* at 216-19 (citing *Robinson*, *supra* at 467-468) (emphasis added). The Court relied on *Robinson* to support its decision to overrule prior decisions which misread and misconstrued the GTLA and perpetuated a prior incorrect construction of the statute. *Id.*

Again, in *Nawrocki v Macomb Cnty Rd Comm'n*, 463 Mich 143, 180-81; 615 NW2d 702 (2000), this Court overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), because *Pick* failed to narrowly construe the highway exception to the GTLA and contradicted the

language of the GTLA, imposing upon state and county road commissions a duty under the highway exception to install, maintain, repair, or improve traffic control devices, including traffic signs, which was not required by the language of the statute. In reaching this decision, the Court cited to *People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998), which sets forth the proper circumstances under which prior case law should be overruled based on an incorrect interpretation of clear statutory language:

> It is true of course that we do not lightly overrule a case. This Court has stated on many occasions that "under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Further, . .. "before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it. Although we respect the principle of stare decisis, we also recognize the common wisdom that the rule of stare decisis is not an inexorable command. [Citations omitted.]

Nawrocki, supra at 180 (citing *Graves, supra*) (emphasis added).

B. Analysis.

There is no language in the WPA's statute of limitations provision which provides a basis for any court to suspend the statute of limitations until the party seeking to asserting a WPA claim learns of allegedly retaliatory conduct. In this regard, the WPA provides:

> A person who alleged a violation of this act may bring a civil action for appropriate relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

MCL 15.363(1) (emphasis added). This language in the WPA is clear and unambiguous. Therefore, the statute must be enforced as written. Plaintiff has provided no basis upon which to disregard established Michigan law, which not only provides but requires that unambiguous statutory language must be enforced as written. Indeed, any court that holds otherwise, renders the WPA "surplusage" and "nugatory," an outcome which is contrary to Michigan law.

Importantly, the WPA also provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL 15.362 (emphasis added). This provision clearly and unambiguously provides that an employer's unlawful conduct which provides the basis for asserting a violation of the WPA consists of discharging, threatening or other discriminating against an employee.

According to this provision, an employer's alleged violation of the WPA is not measured by an employee's construction, understanding or knowledge of the employer's alleged violation. Rather, this provision of the WPA unambiguously provides that it is the conduct itself which is unlawful. It follows that the WPA's statute of limitations is measured from when the violation of the WPA takes place, which is when the employer engages in the disputed conduct. Yet, Plaintiff asserts that an employer's violation of the WPA does not take place until the impact of the employer's unlawful conduct is perceived by the employee. Consequently then, under Plaintiff's logic, the WPA's statute of limitations would not begin to run until the employer's violation of the Act is understood by the employee. This logic is contrary to the WPA's clear and unambiguous language and, if applied in the instant case, would impermissibly expand the WPA and permit a construction of the WPA that exceeds its actual coverage.

Such a suggested result is no different than that which this Court rejected in *Wurtz*, *supra*, in which the plaintiff attempted to assert that the WPA applied to an employer's failure to renew an expired employment contract. Noting the rules of statutory construction applicable to clear and unambiguous statutory language, this Court rejected the plaintiff's assertion and directed that

because an employee who was no longer operating under an active employment agreement was not an employee covered by the WPA, his claim asserting retaliation for failure to renew an employment contract was not covered by the WPA. Similarly, in response to a plaintiff's attempt to read language into the WPA that does not exist in the text of the WPA, this Court rejected the defendant's assertion that a plaintiff's WPA protected actions or conduct, as an objective matter, must advance the public interest to entitle a plaintiff to WPA protection. *Whitman v City of Burton*, 499 Mich 861; 873 NW2d 593 (2016). Because adoption of the defendant's reading of the WPA would have led to judicial amendment of the WPA, this Court, citing to *Wurtz, supra*, rejected the defendant's suggested interpretation.

Just as the unsuccessful plaintiff and defendant did in *Wurtz* and *Whitman*, Plaintiff here asserts that this Court should enlarge the coverage and scope of the WPA and read language into the statute which does not exist. Plaintiff asserts that the date on which the employer violates the WPA is not the date on which the statute of limitations begins to run. Rather, according to Plaintiff's logic, the last day on which Plaintiff worked, or at least the date on which he received knowledge of the employer's violation of the WPA, is the date when the WPA's limitations period begins to run. Plaintiff offers no case law to support this assertion. He merely insists that his interpretation of the WPA makes more sense and that this Court must, therefore, adopt his reasoning. This result is neither supported by Michigan law nor consistent with the actual rules of statutory construction in Michigan. Therefore, this Court should not and, indeed, cannot, adopt Plaintiff's reasoning. Doing so would expand upon the clear and unambiguous language of the WPA and result in the impermissible judicial amendment of the WPA, a result which this Court routinely and consistently rejects.

II. Even If Michigan Law Did Not Require The Application Of The WPA's Clear And Unambiguous Language To Prevent Plaintiff's Suggested Revision To The WPA's Statutory Limitations Period, Other Michigan Law Is Consistent With And Supports The Lower Courts' Decisions That Plaintiff's Complaint Was Untimely.

The trial court and Court of Appeals based their decisions that Plaintiff's complaint was untimely, in part, on this Court's holding in *Joliet v Pitoniak,* 475 Mich 30; 715 NW2d 60 (2006). Plaintiff asserts that doing so was inappropriate because the limitations period at issue in *Joliet* was Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") rather than the WPA at issue here. Plaintiff also asserts that the *Joliet* decision is inconsistent with other Michigan law regarding claim accrual. Plaintiff's suggested distinction is irrelevant, as the legal principles set forth in *Joliet* apply with equal force and effect in the instant matter, as the *Joliet* decision relates not to the specific provisions in the ELCRA but rather to the basic legal principles regarding claim accrual.

Further, to adopt Plaintiff's position would be to disregard Michigan's established legal principles regarding claim accrual and would needlessly and recklessly alter the state of the law in Michigan. As demonstrated below, adoption of Plaintiff's position would alter Michigan law, as Plaintiff's position conflicts not only with *Joliet,* but with other decisions of this Court and the Court of Appeals relating to claim accrual.

A. Prior Decisions of This Court Do Not Require Alteration Of The WPA's Statutory Limitations Period, As All Decisions Plaintiff Cites To Support His Position Actually Support Defendants' Position.

1. Relevant Case Law.

The common thread among each of the cases at issue here is that in each, there was a question when the plaintiff's allegedly discriminatory separation from an employer was effective such that the applicable statute of limitations was triggered. Here, there is no such question

based on the content of the CCA's letter to Plaintiff and the plain language of the WPA. Therefore, despite Plaintiff's insistence to the contrary, Michigan law regarding claim accrual is consistent with the lower courts' decisions here.

In *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288; 542 NW2d 365 (1995), the Court of Appeals determined that a plaintiff's cause of action under the ELCRA did not accrue on the later "effective date of separation" but the date that the termination actually took place. In *Parker*, after being advised in early December 1990 that they would be laid off, the plaintiffs worked their last day on December 21, 1990. Contrary to the date of actual discharge, the defendant's records stated that the effective date of the plaintiffs' separation was January 7, 1991. The plaintiffs filed their complaints on January 7, 1994, asserting that the actual date of their separation from the defendant's employment was January 7, 1991, based on the defendant's records. However, because the discharge actually occurred on December 21, 1990, the Court of Appeals determined that the plaintiffs' claims accrued on that date and not the later "effective date of separation," on January 7, 1991. Accordingly, the plaintiffs asserted their claims outside the three-year statute of limitations, their claims were time barred and the Court determined that the plaintiffs' last day worked was the date of discharge for purposes of claim accrual.

In *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713 (2003), this Court, referencing the holding in *Parker*, held that the plaintiff's last day worked was not the date that her employment discrimination claim accrued, as the plaintiff's employment had not yet been terminated on that date. In contrast to *Parker*, the *Collins* plaintiff was suspended from working during an investigation and the last date that she actually worked was September 5, 1996. Based on the holding in *Parker*, the Court of Appeals determined that a plaintiff's claim always accrues on the last day worked. This Court disagreed and determined that because the plaintiff had not

yet been terminated from employment on September 5, 1996, the date when she was suspended, her claim did not accrue until she was actually terminated on a later date.

In *Magee v DaimlerChrysler Corp*, 472 Mich 108; 693 NW2d 166 (2005), this Court determined that the plaintiff's ELCRA claim was untimely where she asserted her claim three years from the date she resigned her employment, as opposed to the earlier date when she determined she could no longer work for the defendant employer due to discriminatory treatment. This Court's decision reversed the Court of Appeals, which incorrectly applied *Collins* to hold that the plaintiff's termination date was the date on which her claim accrued. In contrast, this Court held that the plaintiff's claim accrued on the date she took a leave of absence due to alleged ongoing workplace discrimination. Because the plaintiff left work due to discrimination on an earlier date, this Court determined that the unlawful discrimination triggering the plaintiff's claim took place on that earlier date and the date when the plaintiff actually resigned was irrelevant for purposes of claim accrual.

Building on these decisions, in *Joliet, supra*, this Court held that claim accrual under the ELCRA's three-year statute of limitations is measured by "the time the wrong upon which the claim is based *was done* regardless of the time when damage results." *Id*. at 34. Therefore, the plaintiff's claims were barred unless they were brought within three years of the date of the alleged wrong doing, not when the plaintiff determined that the alleged discrimination became unbearable such that she asserted she was constructively discharged. In *Joliet*, a constructive discharge case, the plaintiff asserted that her claim accrued when she decided to leave her employment. In reaching this conclusion, this Court engaged in a critical analysis regarding claim accrual. In doing so, the Court relied on its decision in *Magee* to hold that "the basic question to answer when analyzing the accrual date of a claim under the CRA is when did the

'injury' or 'wrong' take place." Applying this analysis, the Court then determined that the plaintiff's claims accrued at the time the wrongs on which her claims were based were committed, not when she suffered the damage. "Thus, the relevant date for the period of limitations is not plaintiff's last day of work, but the date of the last discriminatory incident or misrepresentation."

Importantly, the Court distinguished and overruled *Jacobson v Parda Fed Credit Union*, 457 Mich 318; 577 NW2d 881 (1998). This Court recognized that the *Jacobson* Court erroneously treated an employee's resignation as a violation of the WPA in a constructive discharge context. However, because the basis for a constructive discharge claim is that the employer engaged in underlying discriminatory or retaliatory conduct, it is the employer's wrongful act that starts the period of limitations and not the time when the employee decides to leave as a result of that conduct. This Court overruled *Jacobson's* holding to the contrary because it was inconsistent with *Magee* and the plain language of the statute of limitations under the WPA and ELCRA. Critical to the instant case, the Court noted that "[w]here the resignation is not itself an unlawful act perpetrated by the employer, it simply is not a 'violation' of the WPA under the plain language of MCL 15.362, which prohibits discharge, threats, or other discrimination by the employer."

2. <u>Analysis</u>.

Pursuant to the established Michigan law discussed above, with respect to the CCA, the CCA's March 27, 2014 letter to Plaintiff was the alleged unlawful violation of the WPA which forms the basis of his WPA claim. The letter states:

> Please be advised that I have recently been informed by both Elba Township and Imlay City. I regret to inform you that they no longer wish for you to act as their plumbing and mechanical official and <u>request that you immediately cease conducting all plumbing and mechanical inspections within their communities</u>.

(See Exhibit C to Plaintiff's Complaint) (emphasis added). Based on the content of the CCA's letter terminating Plaintiff's service to the City and the Township, there is no question that the CCA unequivocally terminated Plaintiff's services to the City and Township effective immediately. The fact that Plaintiff continued providing services to the City or Township beyond the date of the letter is irrelevant, as Michigan law provides that a claim under the WPA accrues not when a plaintiff acknowledges or feels the impact of the underlying unlawful conduct, but when the unlawful conduct takes places. To hold otherwise would create a conflict with *Joliet*, *Magee* and *Parker*, which provide that the unlawful conduct itself forms the basis of a discrimination or retaliation claim. Regardless of whether the claim is for termination or constructive discharge, Michigan law provides that it is the allegedly unlawful act itself that triggers the statute of limitations.

Accordingly, based on the evolution of case law set forth above, this Court has already resolved the issue Plaintiff has raised in his Application and *Joliet* resolves each contrary assertion Plaintiff has made. First, *Joliet* acknowledges that the WPA specifically prohibits an employer from discharging, threatening, or otherwise discriminating against an employee. This establishes that it is the allegedly unlawful conduct or actual violation of the WPA by the employer that starts the running of the statute of limitations and not any other conduct or act. This means that, for purposes of asserting Plaintiff's claim here, the CCA's March 27, 2014 letter which informed Plaintiff that he was to cease providing services to the City and Township immediately was the unlawful conduct which violated the WPA.

Just like the decision in *Magee*, the critical point is that the CCA's March 27, 2014 letter informed Plaintiff of the termination of his services. It is this termination from providing services to the City and Township that forms the basis for Plaintiff's WPA claim. The basis for

his claim is not the date when he understood he would no longer perform services for the City and Township and, indeed, Plaintiff does not even mention this in his complaint. Rather, he himself asserts that the CCA's decision to relieve him from performing these services is the act that violated the WPA. The CCA informed Plaintiff of this decision on March 27, 2014. The CCA's conduct in this regard was the allegedly unlawful "discharge," "threat" or other discriminatory conduct by the employer. The CCA engaged in this conduct when it wrote the letter. For purposes of the WPA's statute of limitations or violation provisions, the CCA did not engage in any other conduct which could have violated the WPA. Therefore, the fact that Plaintiff asserts that he received the letter on a later date is irrelevant pursuant to the progression of claim accrual analyses set forth in *Joliet*, *Magee*, *Collins* and *Parker*.

In fact, Plaintiff's assertion here is identical to the plaintiff's unsuccessful argument in *Parker*, in which the plaintiff asserted that the defendant employer's record setting forth a later "effective date of separation" was the date when the statute of limitations began to run and not the actual date of termination. Here, under Plaintiff's theory, although the CCA terminated his services to the City and Township on March 27, 2014, he could have potentially avoided returning to work until July and suspended the 90-day statutory limitations period based on his own conduct of not returning to work. Indeed, any employee could potentially suspend the applicable statute of limitations by not acknowledging a termination or discharge from employment, citing a leave of absence or other basis for not returning to work. However, this circumvents the WPA's clear language that it is the **employer's** conduct that violates the WPA and nothing else.

Just as the Court of Appeals in *Parker* determined that the plaintiff's last day worked was the statute of limitations trigger and not a later "effective date of separation," in the instant

matter, the WPA does not permit a plaintiff to control the date when the employer engages in the discriminatory conduct which violates the WPA. Rather, a claim asserting a violation of the WPA accrues when the **employer** engages in unlawful conduct and not when a plaintiff decides to acknowledge that conduct. Any other result would be contrary to the WPA's plain language and prior decisions of this Court setting forth Michigan's guiding legal principles regarding claim accrual.

Plaintiff's assertions are also inconsistent with this Court's decision in *Magee*, in which the Court determined that the plaintiff's claim accrued on the date the employer actually terminated her employment and not the last day the plaintiff worked, when she began a leave of absence. Consistent with *Magee*, Plaintiff here was terminated from providing services to the City and Township on March 27, 2014. Plaintiff's assertion that the Court should instead look *Collins'* "last day worked" assessment is incorrect and presents a mischaracterization of the *Collins* decision and Michigan law. Indeed, *Collins*' last day worked analysis related to a situation where the plaintiff's last day of work was different from a subsequent documented official separation date. Nevertheless, the analysis in *Collins* supports the CCA's position here. In *Collins*, the plaintiff attempted to extend the statute of limitations to the employer's documented effective date of termination, which was weeks after the last day the plaintiff was discharged and actually appeared for work. The Court refused to extend the WPA's limitations period to the later effective date of termination and instead determined that the plaintiff's claim accrued on the last day that he appeared for work because this was the date on which the employer, if at all, engaged in discriminatory conduct which would violate the WPA.

Here, pursuant to *Collins*, the only date on which the CCA could have violated the WPA was March 27, 2017, the date on which it terminated Plaintiff's service to the City and

Township. Plaintiff's understanding of this termination on a later date is of no consequence under *Collins*. Therefore, Plaintiff's claim accrued, as to the CCA, on March 27, 2017 and Plaintiff's complaint, asserting a WPA violation based on this letter, was untimely and Plaintiff's WPA claim against the CCA is barred.

This analysis is consistent with this Court's recent decision in *Frank v Linkner*, ___Mich___; 894 NW2d 574 (2017). In *Frank*, the Court considered when a claim accrues for purposes of a claim asserting a limited liability company ("LLC") managers' oppression of LLC members. As to this issue, the Court held:

> Once a plaintiff proves that a manager engaged in an action or series of actions that substantially interfered with his or her interests as a member, the "harm" has been incurred, and therefore the claim has accrued. Under MCL 600.5827, this is true regardless of the time when monetary damages result. Thus, even if plaintiffs did not incur a calculable financial injury until 2012, their actions could still have accrued at an earlier date if their interests as members had been the subject of substantial interference.

Frank, supra at *23. Accordingly, regardless of the context in which claim accrual principles are applied, this Court has consistently held that a plaintiff's claim accrues when the harm forming the basis a claim takes place and not when damage results.

This result is also consistent with other decisions of this Court in which a plaintiff has attempted to assert equitable tolling pursuant to the common law "discovery rule" to abrogate a statutory limitations period. Specifically, in *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007), this Court held:

> Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827.

Id. at 391-92. Similarly, in the instant matter, the Legislature crafted clear and unambiguous language in the WPA's 90-day statute of limitations provision as well as the provision enumerating the types of conduct violative of the WPA. The Legislature did not provide for tolling for any reason. Therefore, to allow such a result would be to undermine and disregard the Legislature's intent regarding application of the statute of limitations pursuant to established Michigan law.

IV. CONCLUSION

WHEREFORE, Defendant Construction Code Authority respectfully requests that this Court deny Plaintiff's Application for Leave to Appeal, affirm the Court of Appeals' August 4, 2016 order affirming summary disposition in Defendant's Construction Code Authority's favor and grant any other relief the Court deems just and appropriate.

Respectfully submitted,

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